IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH, JAIPUR.

:: O R D E R ::

1. D.B. CIVIL WRIT PETITION NO.2490/1987
(Roop Singh Vs. The Union of India & Ors.)
2. D.B. CIVIL WRIT PETITION NO.5506/1994
(Dilip Singh Vs. The Union of India & Ors.)
3. D.B. CIVIL WRIT PETITION NO.2272/1996
(Devendra Singh Vs. The Union of India & Ors.)
4. D.B. CIVIL WRIT PETITION NO.2223/1996
(Pradeep Kumar Vs. The Union of India & Ors.)
5. D.B. CIVIL WRIT PETITION NO.6145/1994
(Harman Singh Vs. The Union of India & Ors.)
6. D.B. CIVIL WRIT PETITION NO.6134/1994
(Chatar Singh Vs. The Union of India & Ors.)
7. D.B. CIVIL WRIT PETITION NO.5689/1994
(Bhagwan Sahai Meena Vs. The Union of India & Ors.)

Date of Order :: 31ST August, 2006

P R E S E N T

HON'BLE THE CHIEF JUSTICE SHRI S.N. JHA
HON'BLE SHRI JUSTICE AJAY RASTOGI

::

Reportable

Shri Rajendra Prasad for petitioners.
Shri K.K. Sharma for respondents.

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BY THE COURT (PER HON'BLE THE CHIEF JUSTICE)

In these seven writ petitions, the

petitioners, ex-army personnel, are aggrieved by the punishment awarded to them in Court Martial proceeding. They also seek to challenge the validity of the provisions relating to summary court martial under the Army Act, 1950 and the Army Rules, 1954. As vires has been challenged in all the petitions, they were heard together.

In Writ Petition no.2490/1987 petitioner Roop Singh was found by the Duty Officer running from the direction of out-of-bound area at about 0030 hours in the night of 17/18 May, 1987 when he was supposed to be on sentry duty for which he was tried by summary court martial for committing an act prejudicial to good order and military discipline under Section 63 of the Army Act. Before being subjected to court-martial, summary of evidence was recorded in presence of an independent witness, the charge and names of witness were made known to him. The petitioner refused to accept copy of the charge-sheet and the summary of evidence. During summary court-martial proceedings, in the circumstances, charge was read over to him in presence of two witnesses. On completion of the proceedings, he was sentenced to one year’s rigorous imprisonment which was later reduced to six months’ and dismissed from service on 14.6.1987. From the reply of the respondents it appears that the incident had taken place when the

unit was posted 1.5 kms. from the border during ‘Operation Trident’. An incident had occurred in the neighbourhood in which a woman had been reportedly raped by some army personnel and in the circumstances, instructions had been issued declaring the adjoining villages as ‘out-of-bound’ area. In violation of the instructions, the petitioner went to the said area, he was seen in the midnight running from that direction. He took the plea that he had gone to that side to know the password. The reply states that earlier two red ink entries had been made against the petitioner – (i) for absence without leave under Section 39(a) of the Army Act; and (ii) for committing act prejudicial to good order and military discipline (consuming) liquor under Section 63 of the Army Act. At the relevant time, he had four years and ten months service to his credit including one year as a recruit.

In Writ Petition no.5506/1994, petitioner Dilip Singh was enrolled in the Army in 1986 as Sepoy (Nursing Assistant). He was charged with absence without leave from the unit lines from 1600 to 2200 hours on 1.8.1993 and using criminal force to his superior officers namely Sub./NA H.N. Gautam and Hav/NA Shawale Babasahab Shrimuri whom he allegedly assaulted by hands on their face and chest. Summary of evidence was recorded. He

declined to cross-examine and accepted his guilt. He was supplied copy of charge-sheet, summary of evidence. At the stage of summary court-martial, he was again apprised of the charges and consequences of his pleading guilty. The petitioner again admitted his guilt. He was punished with three months' rigorous imprisonment and dismissed from service on 7.8.1993. He preferred appeal without any success.

In Writ Petition no.5689/1994, petitioner Bhagwan Sahai was enrolled was enrolled as Sepoy in the Army on 8.1979. While he was posted with Det.515 ASC Bn attached with 5011 ASC Bn(MT), he was sanctioned 42 days annual leave from 16.3.1992 to 26.4.1992. He failed to report on 27.4.1992. He had been informed about refusal of his request for extension of leave. He ultimately submitted joining on 2.2.1993 after remaining wilfully absent from duty for 302 days.

Charge-sheet was served and summary of evidence was recorded in course of which he was afforded opportunity to cross-examine witness and examine his own in defence. He declined to cross-examine the witnesses and make any statement in his defence. Instead, he admitted his guilt. Summary Court Martial was thereafter held. Charge was explained and papers were supplied, and he was provided with 'friend of accused' and informed of

the consequences of pleading guilty. After going through the papers supplied to him, he admitted his guilt which was recorded. He was declared deserter and held guilty of the charge under Section 38(1) of the Army Act and dismissed from service on 8.4.1993. He preferred appeal which was rejected on 26.7.1994.

In Writ Petition no.6134/1994, petitioner Chatar Singh was enrolled in the Army on 28.9.1976. He proved to be the habitual absentee. He remained absent from duty without leave for 12 days from 1.1.1982 to 2.11.1982 for which he was awarded punishment of 21 days rigorous imprisonment in military custody on 6.12.1982. He overstayed leave without sufficient cause for 05 days from 8.10.1991 to 13.10.1991 for which he was awarded penalty of reduction in rank after Summary Court Martial. The punishment was set aside on technical ground and the authority was advised to hold de novo proceeding. After fresh proceeding, the same punishment of reduction in rank was awarded on 24.10.1992. He again remained absent without leave for 16 days from 28.10.1992 i.e. within four days of the above order of punishment. Earlier too, he had overstayed leave for 02 days from 13.7.1992 to 14.7.1992, and remained absent without leave from 19.8.1992 to 01.09.1992 for which he was subjected to court martial. In course

of the summary court marital proceeding he pleaded guilty. He had been told about nature of the charge and consequences of pleading guilty and difference in procedure in case of pleading guilty. He was found guilty of the charge under Section 39 (a) and (b), and dismissed from service on 5.1.1993. He preferred appeal which was rejected on 28.6.1994.

In Writ Petition no.6145/1994, petitioner Harman Singh was enrolled in the Army on 2.10.1978. While he was posted as Gunner (L/Nk) on Guard Duty on 3.11.1991, he alongwith others allegedly took a woman, one Smt. Geeta Devi, inside the bunker and cohabitated contrary to discipline. Smt. Geeta Devi later lodged an FIR at P.S. Ranbir Singh Pura on 20.12.1991 alleging that she had been raped by the petitioner. She identified the petitioner in the test identification parade. Challan was filed against the petitioner for offence under Sections 376/341 IPC and the case was committed to the Court of Session. The case was later taken over for trial under the Army Act. The Army Headquarters ordered a Court of Inquiry and summary of evidence was recorded which disclosed commission of offence under Section 63 of the Army Act and a charge-sheet was issued to the petitioner. At the stage of recording of summary of evidence he was given

opportunity to cross-examine the witnesses and produce evidence in defence; but he declined to cross-examine the witnesses. He was later tried by summary court martial in course of which he was again informed of the charges, supplied copies of the documents and provided the service of ‘friend of accused’. In course of the proceedings, he pleaded guilty. He was made aware of the consequences of pleading guilty. After completion of the proceedings, petitioner was sentenced to four months’ rigorous imprisoment and dismissed from service on 31.8.1992.

In Writ Petition no.2223/1996, petitioner Pradeep Kumar was enrolled in the Army on 28.12.1989. In course of his deployment with 820 Fd Wksp Coy from 21.5.1994 to 24.8.1994 for a period of 96 days, he performed his duties on only 22 days, reporting sick six times during the period allegedly to avoid duty. On 8.8.1994 he came for morning parade but fell out of ranks without permission and slapped and kicked Sub. Major T.D. Juneja in front of the whole Company for which he was charged with the offence of using criminal force to superior officer punishable under Section 40 of the Army Act. Summary of evidence was recorded and he was given opportunity to produce evidence in defence but he did not do so, he rather admitted his guilt. In course of

summary court martial, the charge was explained to him and was supplied with copies of papers and also made aware of the consequences of his pleading guilty, he again pleaded guilty and requested to be forgiven promising that he would not repeat such act in future. Statement was recorded vide Annexure-8. After completion of the proceedings he was sentenced to six months' rigorous imprisonment and further dismissed from service on 24.8.1994. He sought review of the punishment which was rejected on 2.11.1994.

In Writ Petition no.2272/1996, petitioner Devendra Singh was enrolled in the Army on 16.10.1970. A Court of Inquiry was ordered to investigate into circumstances in which he allegedly entered the house of Nk B.L. Chouhan on 23.9.1987 and his possible intention. Summary of evidence was recorded in his presence and he was given opportunity to participate in the hearing. The evidence collected in course of inquiry disclosed prima facie case, and he was subjected to summary court martial. In course of the court martial proceedings, the charge was read over and explained, and copies of the relevant papers were supplied to him. He was also made aware of the consequences of his pleading guilty. His plea of guilt was thereafter recorded and he was awarded the penalty of reduction to ranks on 23.10.1987.

It would thus appear that out of seven cases, except Roop Singh in Writ Petition no.2490/1987, in all other cases the petitioners had pleaded guilty. In those cases, even though the petitioners have challenged the vires of various provisions of the Army Act and the Rules, a limited argument was made at the time of hearing regarding non-compliance of rule 115 of the Army Rules and the punishment being excessive. We shall deal with these six case separately later in this judgment.

Coming to the case of Roop Singh, the validity of punishment was challenged both on legal as well as factual grounds. It was also submitted that the Commanding Officer who headed the summary court martial was biased against the petitioner, as he suspected him of having written an anonymous letter containing allegations against him. The thrust of the argument of the counsel however was that summary court martial proceedings are less 'offender-friendly' than general court martial or district court martial; persons subjected to summary court martial do not get the same opportunity to defend themselves as in the case of general or district court martial. It was also submitted that the choice of the type of court martial i.e. choice of manner of trial –

whether by general court martial or district court martial or summary court martial – depends on rank of the offender rather than nature of offence(s) which is irrational. Trial for the same or similar offence if committed by an officer may be held by a general court martial or district court martial but if it is committed by a ranker, he would be tried by summary court martial. The classification on the basis of rank rather than the offence – in the absence of guidelines either in the Army Act or Rule - according to the counsel is arbitrary and unconstitutional. In support of these submissions, reliance was placed on Ram Krishna Dalmia V. Justice S.R. Tendolkar, AIR 1958 SC 538.

Before making comments on the submissions of the counsel, it may be useful to refer to certain provisions of the Army Act. Section 108 of the Act provides for four kinds of Court-martial – general Court-martial, district Court-martial, summary general Court-martial and summary Court-martial. Section 109 provides that general Court-martial may be convened by the Central Government or the Chief of the Army Staff or by an officer empowered in this behalf by warrant of the Chief of the Army Staff. A district Court-martial under Section 110 may be convened by an officer empowered to convene general Court-martial or by an officer empowered in this behalf by warrant of

any such officer. Summary general Court-martial may be convened, under Section 112 (a) by an officer empowered in this behalf by an order or the Central Government of the Chief of the Army Staff; (b) by the officer commanding the forces in the field or any officer empowered him in this behalf, on active service; and (c) by an officer commanding any detached portion of the regular army on active service when, in his opinion, it is not practicable, with due regard to discipline and the exigencies of the service, that an offence should be tried by a general Court-martial. A summary Court-martial may be held, under Section 116, by the commanding officer of any corps, department or detachment of the regular Army. Sections 113, 114 and 115 lay down the composition of the general Court-martial, district Court-martial and summary general Court-martial respectively. In the case of summary Court-martial, in terms of Section 116, the commanding officer of any corps, department or detachment, as the case may be, alone constitutes the Court. Sections 118 and 119 lay down the powers of the general and summary general Courts-martial, and district Court-martial respectively. Section 120 lays down the powers of the summary Courts-martial. Depending on the powers conferred on them respectively, they can award punishments specified under Section 71. Section 71 contains list of 12

punishments arranged according to scale starting from death to stoppage of pay and allowances. Under Section 72 these punishments are to be inflicted in connection with the offences committed by the persons subject to the Army Act. Offences are specified under chapter VI comprising of Sections 34 to 70. While Sections 34 to 68 are offences special to the persons subjected to the Army Act, Section 69 refers to civil offences. It lays down that subject to the provisions of Section 70 (which refers to certain civil offences not triable by Court-martial), any person subject to this Act who at any place in or beyond India, commits any civil offence, shall be deemed to be guilty of an offence against this Act and if charged therewith under this section, shall be liable to be tried by a court-martial and, on conviction, be punishable in the manner laid down in clauses (a) and (b).

Having regard to the nature of dispute involved in this case, it is not necessary to refer to details of these provisions. The grievance of the petitioner is that while the procedure laid down for trial by general Court-martial or district Court-martial is more detailed and the offender has been provided greater opportunity to defend himself, he is deprived of such opportunity and right when he is tried by

summary Court-martial. The point which arises for consideration is whether and to what extent such a grievance which basically is in the nature of the procedure being discriminatory and arbitrary and therefore violative of Article 14 of the Constitution of India, can be entertained in view of the provisions of Article 33 of the Constitution of India. It is to be kept in mind that proceedings and the decision of the Court-martial can be challenged only under Article 226 of the Constitution. The power of superintendence conferred on the High Court under Article 227 does not extend to Court or Tribunal constituted by or under any law relating to the armed forces i.e. court-martial - vide clause (4) of Article 227.

Article 33 confers power on the Parliament to restict or abrogate the fundamental rights and the rights of the members of the armed forces to the extent as it may determine by law "to ensure the proper discharge of duties by the Armed Forces and the maintenance of discipline among them". Article 33 may usefully be quoted verbatim as under "

> "33. **Power of Parliament to modify the rights conferred by this Part in their application to Forces, *etc*.**- Parliament may, by law, determine to what extent any of the rights conferred by this Part, shall in their application to,-
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> (a) the members of the Armed Forces; or

(b) the members of the Forces charged with the maintenance of public order; or

(c) persons employed in any bureau or other organization established by the State for purposes of intelligence or counter intelligence; or

(d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organization referred to in clauses (a) to (c),

be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."

It not in dispute that the Parliament was competent to enact the law relating to armed forces vide entry 2 in list 1 in the Seventh Schedule to the Constitution, and by virtue of Article 33 the Parliament was competent to restrict and abrogate the rights conferred on citizens under Part III i.e. fundamental rights.

Dealing with the scope of Article 33 as it then stood (the provision was materially the same as at present, after the fiftieth amendment in the Constitution of India in 1984), a Constitution Bench of the Supreme Court in Ram Sarup V. Union of India, AIR 1965 SC 247, observed as under :-

". . . The learned Attorney General has urged that the entire Act has been enacted by Parliament and if any of the provisions of the Act is not consistent

> with the provisions of any of the articles in Part III of the Constitution, it must be taken that to the extent of the inconsistency Parliament had modified the fundamental rights under those articles in their application to the person subject to that Act. Any such provisions in the Act is as much law as the entire Act. We agree that each and every provision of the Act is a law made by Parliament and that if any such provision tends to affect the fundamental right under Part III of the Constitution, that provision does not , on that account, become void, as it must be taken that Parliament has thereby, in the exercise of its power under Art. 33 of the Constitution, made the requisite modification to affect the respective fundamental right. . . .”

Article 33 again came up for consideration before the Supreme Court in Lt.-Col. Prithi Pal Singh Bedi V. Union of India, (1982) 3 SCC 140. It may be apposite to extract the relevant observations therefrom as under :-

> “. . . Therefore, every provision of the Army Act enacted by the Parliament, if in conflict with the fundamental rights conferred by Part III, shall have to be read subject to Article 33 as being enacted with a view to either restricting or abrogating other fundamental rights to the extent of inconsistency or repugnancy between Part III of the Constitution and the Army Act. This is no more res integra in view of the decision of the Constitution Bench in *Ram Sarup v. Union of India,* in which repelling the contention that the restriction or abrogation of the fundamental rights in exercise of the power conferred by Article 33 is limited to one set out in Section 21 of the Act. . . .”

It would thus appear, having regard to the constitutional mandate of Article 33 as

explained in the aforementioned decisions of the Apex Court, that the grievance as to the provisions relating to summary Court-martial being discriminatory and therefore violative of Article 14 cannot be entertained.

On behalf of the petitioners, it was submitted that what Article 33 saves is law enacted by the Parliament and not subordinate legislation. Thus while provisions of the Act may not be challenged as infringing fundamental rights, the provisions of the Army Rules do not enjoy that immunity. On behalf of the respondents our attention was drawn to Section 193 of the Army Act which provides that all rules and regulations made under the Act "shall have effect as if enacted in this Act".

Similar question arose though in a different context viz effect of repeal of a statute in Chief Inspector of Mines V. Lala Karam Chand Thapar, AIR 1961 SC 838. After noticing various foreign decisions, the Constitution Bench did not record a clear finding but observed as follows :-

> "The true position appears to be that the Rules and Regulations do not lose their character as rules and regulations, even though they are to be of the same effect as if contained in the Act. They continue to be rules subordinate to the Act, and though for certain purposes, including the purpose of construction, they are to be treated as if contained in the Act, their true nature as

> subordinate rule is not lost. Therefore, with regard to the effect of a repeal of the Act, they continue to be subject to the operation of S. 24 of the General Clauses Act."

The question also arose in Lt. Col. Prithi Pal Singh Bedi V. Union of India (supra). The Supreme Court noticed the afore-quoted observations in Lala Karam Chand Thapar (supra) and the foreign decisions on the point and observed –

> ". . . . It would, however, appear that this ancient formula often resorted to, to clothe subordinate legislation with the force of the provisions of the statute would require further consideration. It is, however, not necessary to conclude this point because the primary contention was about the non-compliance with rules rather than with their validity."

The question is indeed ticklish. We may however mention that though certain provisions of the Rules were particularly referred to, and commented upon, what the petitioners basic seek to challenge is trial by summary Court-martial which is creature of the Act and not the Rules. Rules have been framed only to carry into effect the provisions of the Act. Therefore, we are inclined to think that challenge to any particular rule apart – which we shall notice later in this judgment – trial by summary Court-martial can not be challenged as being discriminatory.

Indeed, having gone through the various provisions of the Act and the Rules with respect to the trial of offences by summary Court-martial we are firmly of the view that the provisions are not discriminatory and they do not infringe Article 14 of the Constitution. The Army Act and the Rules, in our opinion, contain sufficient safeguards and the offender need have no apprehension about any arbitrary decision at the hands of the officers constituting the summary Court-martial.

Before referring to the various provisions which, in our opinion, contain safeguards against any arbitrary decision by summary Court-martial we may mention that the procedure of trial by Courts-martial was approved by the Supreme Court in Ram Sarup V. Union of India (supra) as being “elaborate and generally follows the pattern of the procedure under the Code of Criminal Procedure”. The dispute therein had arisen in the context of Section 125 of the Act which confers discretion on the commanding officer etc. to decide as to whether the offence shall be tried by ordinary criminal court or the Court-martial, the Supreme Court observed that the persons to whom the provisions of Section 125 apply “do form a distinct class” while observing - in Para 17 of the judgment – that the trial by an

ordinary criminal court would be more beneficial to the accused than one by a Courts-martial. The question then was, their Lordships observed, whether the discretion of the officers concerned in deciding as to which Court should try a particular accused can be said to be an unguided discretion. Their Lordships stated that Section 125 itself does not contain anything which can be said to be a guide for the exercise of discretion, but there is sufficient material in the Act which indicates the policy which is to be a guide for exercising the discretion and it is expected that the discretion is exercised in accordance with it.

Similar observations about Court-martial proceedings were made in Union of India V. Major A. Hussain, (1998) 1 SCC 537 as under :-

> “ . . . . If a court-martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands . . . . . court-martial remains to a significant degree, a specialized part of overall mechanism by which the military discipline is preserved . It is for the special need for the armed forces that a person subject to Army Act is tried by court-martial for an act which is an offence under the Act. Court-martial discharges judicial function and to a great extent is a court where provisions of Evidence Act are applicable. A court-martial has also the same responsibility as any court to protect the rights of the accused charged before it and to follow the procedural safeguards. If one looks at the provisions of law relating to court-martial in the Army Act, the Army Rules, Defence Service Regulations and other Administrative Instructions of the Army,

it is manifestly clear that the procedure prescribed is perhaps equally fair if not more than a criminal trial provides to the accused."

We may now notice the relevant provisions of the Army Rules :-

"22. Hearing of charge.- (1) Every charge against a person subject to the Act shall be head by the Commanding Officer in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call such witness and make such statement as may be necessary for his defence:

PROVIDED THAT where the charge against the accused arises as a result of investigation by a Court of Inquiry, wherein the provisions of Rule 180 have been complied with in respect of that accused, the commanding officer may dispense with the procedure in sub-rule (1).

(2) The commanding officer shall dismiss a charge brought before him, if, in his opinion, the evidence does not show that an offence under the Act has been committed, and may do so, if, he is satisfied that the charge ought not to be proceeded with:

PROVIDED THAT the commanding officer shall not dismiss a charge which he is debarred to try under sub-section (2) of Sec. 120 without reference to superior authority as specified therein.

(3) After compliance of sub-rule (1), if the commanding officer is of opinion that the charge ought to be proceeded with, he shall within a reasonable time –

(a) dispose of the case under Sec.80 in accordance with the manner and form in Appendix III; or

(b) refer the case to the proper superior military authority; or

(c) adjourn the case for the purpose of having the evidence reduced to writing; or

(d) if the accused is below the rank of warrant officer, order his trial by a summary Courts-martial:

PROVIDED THAT the commanding officer shall not order trial by a summary Courts-martial without a reference to the officer empowered to convene a district Courts-martial or on active service a summary general Courts-martial for the trial of the alleged offender unless –

(a) the offence is one of which he can try by a summary Courts-martial without any reference to that officer; or

(b) he considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline.

(4) Where the evidence taken in accordance with sub-rule (3) of this rule discloses an offence other than the offence which was the subject of the investigation, the commanding officer may frame suitable charge(s) on the basis of the evidence so taken as well as the investigation of the original charge.

23. Procedure for taking down the summary of evidence.- Where the case is adjourned for the purpose of having the evidence reduced to writing at the adjourned hearing evidence of the witnesses who were present and gave evidence before the commanding officer, whether against or for the accused, and of any other person whose evidence appears to be relevant, shall be taken down in writing in the presence and hearing of the accused before the commanding officer or such officer as he directs.

(2) The accused may put in cross-examination such questions as he thinks fit to any witness, and the questions together with the answers thereto shall be added to the evidence recorded.

(3) The evidence of each witness after it has been recorded as provided in the rule when taken down, shall be read over to him, and shall be signed by him, or if he cannot write his name, shall be attested by his mark and witnessed as a token of the correctness of the evidence recorded. After all the evidence against the accused has been recorded, the accused

> will be asked: “Do you wish to make any statement ? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence.” Any statement thereupon made by the accused shall be taken down and read over to him, but he will not be cross-examined upon it. The accused may then call his witness, including, if he so desires, any witnesses as to character.
> (4) The evidence of the witnesses and the statement (if any) of the accused shall be recorded in the English language. If the witness of accused, as the case may be, does not understand the English language, the evidence or statement, as recorded, shall be interpreted to him in a language which he understands.
> (5) If a person cannot be compelled to attend as a witness, or if owing to the exigencies of service or any other grounds (including the expense and loss of time involved), the attendance of any witness cannot in the opinion of the officer taking the summary (to be certified by him in writing), be readily produced, a written statement of his evidence purporting to be signed by him may be read to the accused and included in the summary of evidence.
> (6) Any witness who is not subject to military law may be summoned to attend by order under the hand of the Commanding Officer of the accused. The summons shall be in form provided in Appendix III.”

Rules 28, 29 and 30 deal with contents of charge-sheet. Rule 30 provides that each charge shall state one offence only and in no case shall an offence be described in the alternative in the same charge. The charge shall be divided into two parts – (a) statement of the offence; and (b) statement of the particulars of the act, neglect or omission constituting the offence. The offence shall be stated, if not a civil offence, as nearly as practicable, in the words of the Act, and if a

civil offence, in such words as sufficiently describe that offence, but no necessarily in technical words. The particulars shall state such circumstances respecting the alleged offence as will enable the accused to know what act, neglect or omission is intended to be proved against him as constituting the offence. Rule 32 lays down that a charge-sheet shall not be invalid merely by reason of the fact that it contains any mistake in the name or description of the person charged, provided that he does not object to the charge-sheet during the trial, and that no substantial injustice has been done to him. Rule 33 contains provisions as to right of accused to prepare defence and it may be quoted verbatim as under :-

> “Right of accused to prepare defence. – (1) Correspondence between the accused and his legal advisers shall not be liable to be censored. The accused shall inform his commanding officer of the names of such advisers and shall also inform him of any distinctive marks that such correspondence will bear.
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> (2) An accused person shall have the right to interview any witnesses whom he wish to call in his defence. The provisions of Rule 137 shall apply to procuring the attendance of such witnesses.
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> (3) If the accused so desires, the commanding officer of the accused shall take such steps as the circumstances of the case permit to obtain a written statement from a witness whom the accused may wish to call in his defence. The statement shall be obtained in a closed envelope which shall be given to the accused person unopened.
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> (4) If the accused person gives to his commanding officer the name of any person

whom he wishes to call in his defence, no person shall interview such witness with reference to the charges against the accused except in the presence of the accused, unless the accused agrees to dispense with his presence in writing. Similarly if the accused wishes to interview a witness whom the prosecutor intends to call, the interview shall be in the presence of an officer detailed by the commanding officer of the accused person.

(5) . . . . . .

(6) The accused shall have the right to address an application to the Deputy or Assistant Judge-Advocate-General of the command within which he for the time being is: if he is kept under arrest longer than forty-eight days without being brought to trial or is not given full liberty for preparing his defence.

(7) . . . . . .”

Rule 34 may also be quoted as under :-

“Warning of accused for trial. – (1) The accused before he is arraigned shall be informed by an officer of every charge for which he is to be tried and also that, on his giving the names of witnesses or whom he desires to call in his defence, reasonable steps will be taken for procuring their attendance, and those steps shall be taken accordingly. The interval between his being so informed and his arraignment shall not be less than ninety-six hours or where the accused person is on active service less than twenty-four hours.
(2) The officer at the time of so informing the accused shall given him a copy of the charge-sheet and shall, if necessary, read and explain to him the charges brought against him. If the accused desires to have it in a language which he understands, a translation shall also be given to him.
(3) The officer shall also deliver to the accused a list of the names, rank and corps (if any), of the officers who are to form the Court, and where officers in waiting are named, also of those officers

> in Courts-martial other than summary Courts-martial.
> (4) If it appears to the Court that the accused is liable to be prejudiced at this trial by any non-compliance with this rule, the Court shall take steps and, if necessary, adjourn to avoid the accused being so prejudiced."

It may be mentioned here that the afore-mentioned provisions occur in Section 1 of chapter V of the Army Rules captioned 'Investigation of charges and Trial by Court-Martial - power of commanding officer'. These are general provisions applicable in all cases including summary court-martial. Section 2 of Chapter V deals with general and district Courts-martial, while Section 3 deals with summary Court-martial. We shall refer to the provisions relating to summary court-martial a little later in this judgment.

From reading of the afore-mentioned rules, it would appear that at the preliminary stage of hearing on the point of charge under rule 22, the hearing takes place in presence of the accused and he has a right to cross-examine any witness against him, and to call such witness and make such statement as may be necessary for his defence. The Commanding Officer at this stage, may dismiss the charge brought before him, if, in his opinion, the evidence does not show that an offence under the Act has been committed. After hearing on the point of charging over, under sub-

rule (3), on consideration of the evidence brought before him, if the Commanding Officer does not dismiss the charge under sub-rule (2) - he may dispose of the case under Section 80 after following the procedure prescribed in Appendix III (Section 80 refers to awarding of certain minor punishments to persons other than officers/junior commissioned officers/warrant officers) or refer the case to the proper superior military authority or adjourn the case for taking down the summary of evidence as provided in rule 23, or if the accused is below the rank of warrant officer, order his trial by a summary Court-martial.

It is true that in terms of clause (d) of rule 22(3) summary Court-martial can be ordered only in the case of ‘rankers’, that is, if the accused is below the rank of warrant officer. Section 3 (XXIV) of the Army Act defines ‘Warrant Officer’ to mean a person appointed, gazetted or in pay as warrant officer of the regular Army or of the Indian Reserve Force. But from a combined reading of different clauses of rule 22(3) it is manifest that trial by summary Court-martial is one of the options of the commanding officer. It goes without saying that commanding officer is supposed to exercise its discretion considering nature of the charge, evidence gathered during hearing on the point of charge and explanation, if

any, of the accused. What is significant is that the person has not only the right to cross-examine any witness, he can also call witness of his own and make statement in his defence.

Rule 33 also confers certain rights on the accused which are special in the sense that they are not available to accused in an ordinary criminal court. The rule provides that correspondence between the accused and his legal advisers shall not be liable to be censored, he shall have the right to interview any witness whom he may wish to call in his defence. If he so desires, the commanding officer shall permit him to obtain the written statement from witness whom the accused may wish to call in his defence. Such statement shall be kept in closed envelope to be given to the accused unopened. While accused has a right to interview any witness of his own, no other person can interview such witness with reference to the charges against the accused except in the presence of the accused, unless the accused agrees to dispense with his presence in writing. Accused has also the right to address an application to the Deputy or Assistant Judge-Advocate-General of the command if he is kept under arrest longer than forty eight days without being brought to trial or is not given full liberty to prepare his defence. Under rule 34, the

accused is entitled to be supplied copy of charge-sheet and where necessary, to have the charge read over and explained to him.

The challenge to the validity of the provisions relating to summary Court-martial has to be examined in the light of these provisions. The provisions relating to summary Court-martial are contained in Section 3 of Chapter V as mentioned above. Rule 106 provides that the officer holding the trial shall record, or cuase to be recorded in Hindi or English, the transactions of every summary Court-martial. The evidence shall be taken down in a narrative form in as nearly as possible the words used, and where the Court considers it material, in question and answer form verbatim. Rule 107 provides for translation of evidence in certain cases. Rules 108 and 109 provide for assembly and swearing or affirmation of Court and interpreter (if any). Rule 111 deals with arraignment of accused. Under rule 112, the accused may object to the charge on the ground that it does not disclose an offence under the Act or that it is not accordance with the Rules. Rule 113 provides for amendment of charge. Rule 114 refers to special pleas by the accused as to bar of trial. Rule 115 deals with plea of ‘guilty’ or ‘not guilty’. Rule 116

contains procedure in case of plea of ‘guilty’. Rule 118 refers to the procedure after plea of ‘not guilty’. Under rule 119, the Court-martial may call witness in the interest of justice in reply to the defence. Under rule 120, the court gives its final verdict as to whether the accused is guilty or not guilty of the charge.

From afore-mentioned provisions, it is manifest that the rules not only contain sufficient safeguards but they also ensure a fair degree of transparency in the proceedings. No doubt, as observed in Ram Sarup Vs. Union of India (supra), the trial by an ordinary criminal court would be more beneficial to the accused than one by Courts-martial but there can be no two opinions that the persons governed by the Army Act form a separate class and therefore, there cannot be any comparison between ordinary citizens and those governed by the Army Act and the Rules.

As regards the plea of vires, specific reference has been made to Sections 120, 161 of the Act and rule 129 of the Rules. Section 120 deals with powers of summary Court-martial and may be quoted as under :-

> **“Powers of summary Courts-marial.-** (1) Subject to the provisions of sub-section (2), a summary Court-martial may try an offence punishable under this Act.
>
> (2) When there is no grave reason for

> immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district Court-martial or on active service a summary general Court-martial for the trial of the alleged offender, an officer holding a summary Court-martial shall not try without such reference any offence punishable under any of the Secs. 34, 37 and 69, or any offence against the officer holding the Court.
>
> (3) A summary Court-martial may try any person subject to this Act and under the command of the officer holding the Court, except an officer, junior commissioned officer or warrant officer.
>
> (4) A summary Court-martial may pass any sentence which may be passed under this Act, except a sentence of death or transportation, or, of imprisonment for a term exceeding the limit specified in sub-section (5).
>
> (5) The limit referred to in sub-section (4) shall be one year if the officer holding the summary Court-martial is of the rank of lieutenant-colonel and upwards, and three months, if such officer is below that rank."

Section 161 lays down that the finding and sentence of a summary Courts-martial shall not require to be confirmed, but may be carried out forthwith. If the officer holding the trial is of less than five years service, he shall, except on active service, carry into effect the sentence only after it has been approved by the commanding officer of the rank not less than a Brigadeer. Rule 129 which provides for 'friend of accused' lays down that accused person may have a person to assist him during the trial – whether a legal adviser or any other person to defend him on all

points and suggest the questions to be put to witnesses, “but shall not examine or cross-examine witnesses or address the court”. It is this part of the rule which has been impugned.

As regards Section 120, it was submitted, in terms of sub-section (3), trial by summary Court-martial can be held of persons other than “an officer, junior commissioned officer or warrant officer” which, according to the learned counsel, is discriminatory in the sense that only ‘rankers’ can be tried by summary Court-martial, and so far as officers/junior commissioned officers upto warrant officers are concerned, they can be tried only by general or district Courts-martial.

The relevance of the submission has to be examined in the light of the provisions of the Act read with the rules, particularly rule 22, whereunder trial by summary Court-martial is one of the ‘options’ of the commanding officers to be exercised on consideration of the nature of charge, the evidence collected during hearing on the point of charge and the defence of the accused, if any. As a matter of fact, by limiting the punishment to one year if the officer constituting the summary Court-martial is of the

rank of Lieutenant Colonel or above, and three months if he is below the rank of Lieutenant Colonel – under Section 120(4) and (5) of the Act, the interest of the accused has been protected. As indicated above, Section 71 provides for as many as 12 punishments “according to scale” starting from death to stoppage of pay and allowances.

The object underlying restricting the period of imprisonment to one year or three months, as the case may be, apparently is that having regard to the nature of the charge, the evidence collected at the stage of hearing on charge, defence of the accused, the case is such which can be tried by a less cumbersome procedure viz. the trial by summary Court-martial.

A priori the challenge to the validity of Section 161 has to be repelled on the same logic. Similarly, if under rule 129, the friend of accused cannot examine or cross-examine the evidence or address the court, it cannot be said to be irrational. If the decision of the commanding officer under rule 22 to try an accused by summary Court-martial depends on the nature of the charge, evidence collected at the stage of hearing on the point of charge, it is clear that trial by summary Court-martial depends on facts of the particular case, and if that is so, the

submission of the counsel that the choice of trial by summary Court-martial depends on status of the offender and not on nature of the offence must be rejected. This was the thrust of the case of the petitioner. We find no substance therein. The challenge to the vires of the provisions relating to summary Court-martial therefore, must be rejected without taking shelter of Article 33 of the Constitution of India.

Adverting to the individual cases, as seen above, in all the cases, the petitioners were made aware of the charge, statements of the witnesses were recorded in the presence and they were given opportunity to cross-examine them and examine their own witness in defence. We thus do not find any contravention of the rules. As a matter of fact, as seen above, except in the case of Roop Singh, the petitioners in all other cases pleaded guilty at the stage of hearing on the point of the charge as well as at the stage of trial by summary Court-martial.

It was submitted that in these cases (‘plead guilty’ cases), there was non-compliance of rule 115 and therefore, the finding of guilt cannot be said to be in accordance with law. Particular reference was made to sub-rule (2) of rule 115 which provides that if an accused person

pleads ‘guilty”, the plea shall be recorded as the finding of the Court; but before it is recorded, the Court shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be made by the plea of guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence (if any) or otherwise that the accused ought to plead not guilty. It was submitted that the accused was not made aware of the contents of the charge in Hindi language nor he was informed about the effect of the plea and the difference in procedure. It was stated that in one of the cases the plea was recorded in a printed proforma.

Counsel for the respondents submitted on the basis of records which he produced for our perusal that there had been full compliance of the requirements. Though we are satisfied that the procedure was duly followed, we may usefully refer to rule 149 which lays down that a Court-martial would not be held to be invalid even if there was an irregular procedure when no injustice is done. The rule reads as under :-

> “Validity of irregular procedure in certain cases .- Whenever, it appears

> that a Court-martial had jurisdiction to try any person and make a finding and that there is legal evidence or a plea of guilty to justify such finding, and any sentence which the Court-martial had jurisdiction to pass thereon may be confirmed, and shall, if so confirmed and in the case of a summary Courts-martial where confirmation is not necessary, be valid, notwithstanding any deviation from these rule or notwithstanding that the charge-sheet has not been signed by the commanding officer or the convening officer, provided that the charges have, in fact, before trial been approved by the commanding officer and the convening officer or notwithstanding any defect or objection, technical or other, unless it appears that any injustice has been done to the offender, and where any finding and sentence are otherwise valid, they shall not be invalid by reason only of a failure to administer an oath or affirmation to the interpreter or shorthand writer; but nothing in this rule shall relieve an officer from any responsibility for any willful or negligent disregard of any of these rules."

The scope of judicial review under Article 226 of the Constitution is well known by catena of decisions of the Apex Court. Briefly stated, the High Court while exercising power of judicial review does not sit as a court of appeal; it can go into the correctness or otherwise of the decision-making process, but it cannot consider the correctness of decision itself. Further, where there is some material to sustain the finding, the High Court would not go into the question of adequacy. In Union of India Vs. Major A. Hussain (supra) the Supreme Court disapproved "a minute examination" of the record of the general court-

martial by the High Court – “as if it was sitting in appeal” – and held that when there is evidence to sustain conviction, it was unnecessary to examine if pre-trial investigation was adequate or not.

The proceedings, in the instant cases, do not suffer from any error of procedure and therefore the impugned proceedings and the orders do not call for any interference.

Counsel for the petitioners as last resort submitted that the punishment of dismissal was disproportionate and excessive and in this regard placed reliance on Ranjit Thakur V. Union of India, (1987) 4 SCC 611. Counsel for the respondents on the other hand submitted that in exercise of power of judicial review under Article 226 this Court can not go into the nature and extent of punishment and substitute another punishment for the punishment awarded by the authorities. Counsel pointed out that in terms of Section 71 of the Army Act dismissal is a lesser punishment and referred to Union of India Vs. R.K. Sharma, (2001) 9 SCC 592, in this regard.

We find substance in the stand of the respondents. In Ranjit Thakur, the punishment of dismissal had been awarded for a petty act, viz,

refusal to eat his food when asked to do so by the orderly officer of the Regiment. In the facts of the case the Supreme Court observed that the sentence should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to “shock the conscience” and amount in itself to conclusive evidence of bias. Sentence should suit the offence and the offender. In the facts and circumstances of this case, the decision and observation relied upon, lend no help to the petitioners.

In the result, we find no merit in these writ petitions which are accordingly dismissed but without any order as to costs.

[AJAY RASTOGI], J. **[S.N. JHA], CJ.**

Skant/-